PRODUCT LIABILITY/Final Passage

SUBJECT: **Product Liability Fairness Act . . . H.R. 956. Final passage, as amended.**

ACTION: BILL PASSED, 61-37

SYNOPSIS: As amended and passed, H.R. 956, the Product Liability Fairness Act, will establish uniform Federal and State civil litigation standards for product liability actions (except for actions brought for loss or damage to a product itself or for commercial loss), as detailed below.

Punitive damages (see vote Nos. 139, 145-146, 153, and 159-160 for related debate):

- for punitive damages to be awarded, a claimant will have to establish by clear and convincing evidence that the plaintiff intended to cause harm or acted with a conscious, flagrant, indifference to the safety of others;
- either party will be permitted to insist upon a separate proceeding to consider punitive damages, in which case evidence relevant to punitive damages will be admissible only in the punitive damage proceeding;
- if the defendant is an organization with fewer than 25 full-time employees or an individual with a net worth of $500,000 or less, the maximum amount of punitive damages that will be awardable will be the lesser of $250,000 or 2 times the sum of compensatory (economic and noneconomic) losses;
- for defendants that are organizations with more than 25 full-time employees or who are individuals with a net worth of more than $500,000, juries will not be allowed to assess punitive damages in excess of the greater of $250,000 or 2 times the sum of compensatory losses; however, judges will be allowed to increase those punitive damage awards without any limitation; a plaintiff will be permitted to demand a jury trial on punitive damages if a judge adds to the amount awarded by a jury (unanimous consent was sought to remove this right to a jury trial, but was not obtained; those Senators who wished to remove it as part of a compromise agreement stated they would work to remove it in conference); and
- until September 1, 1996, this bill's punitive damages caps will not apply to wrongful death suits in Alabama (current Alabama tort law allows only punitive damages to be awarded in such suits).

Liability:

(See other side)

YEAS (61)

Republicans (46 or 87%)		Democrats (15 or 33%)
Abraham	Hatfield	Conrad
Ashcroft	Helms	Dodd
Bennett	Hutchison	Dorgan
Bond	Inhofe	Exon
Brown	Jeffords	Feinstein
Burns	Kassebaum	Glenn
Campbell	Kempthorne	Johnston
Chafee	Kyl	Kohl
Coats	Lott	Mikulski
Cochran	Lugar	Moseley-Braun
Coverdell	Mack	Nunn
Craig	McCain	Pell
DeWine	McConnell	Pryor
Dole	Murkowski	Robb
Domenici	Nickles	Rockefeller
Faircloth	Pressler	
Frist	Santorum	
Gorton	Smith	
Gramm	Snowe	
Grams	Stevens	
Grassley	Thomas	
Gregg	Thompson	
Hatch	Thurmond	

NAYS (37)

Republicans (7 or 13%)	Democrats (30 or 67%)	
Cohen	Akaka	Heflin
D'Amato	Baucus	Hollings
Packwood	Biden	Inouye
Roth	Bingaman	Kennedy
Shelby	Boxer	Kerrey
Simpson	Bradley	Kerry
Specter	Breaux	Lautenberg
	Bryan	Leahy
	Bumpers	Levin
	Byrd	Moynihan
	Daschle	Murray
	Feingold	Reid
	Ford	Sarbanes
	Graham	Simon
	Harkin	Wellstone

NOT VOTING (2)

Republicans (1)	Democrats (1)
Warner-[2]	Lieberman-[4AY]

EXPLANATION OF ABSENCE:
1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

● the doctrine of joint liability for noneconomic losses will be abolished (some Senators stated that this provision, coupled with the punitive damage caps, will make punitive damage awards several only);

● a product seller other than a manufacturer will be liable only in cases in which it was negligent or breached an express warranty, or in cases in which the manufacturer cannot be sued or is unable to pay a judgment;

● no liability will exist if a plaintiff's drunk or drugged condition was more than 50 percent responsible for his or her injury; and

● liability in a suit will be reduced by the degree to which the harm was caused by a use or alteration of a product in violation of the defendant's warnings (if those warnings were adequate under State law) or by a use or alteration that the plaintiff should have known would cause harm.

Statutes of repose:

● a 20-year statute of repose will apply for "durable goods" (products used in a trade or a business) unless they have warranties of longer than 20 years, cause toxic harm, are aircraft covered by the Federal 18-year statute of repose, are vehicles primarily used to transport people for hire, or are covered by shorter State statutes of repose.

Statute of limitation:

● no suit will be permitted 2 years after a claimant discovers or should have discovered both an injury and its cause.

Alternative dispute resolution procedures:

● within 60 days after service, either party to a product liability suit will be allowed to make an offer to proceed pursuant to any voluntary, nonbinding alternative dispute resolution procedure established or recognized under State law; the opposing party will have 10 days to respond.

Workers' compensation subrogation:

● An employee covered by workers' compensation will not be allowed to recover more than fully for an injury by collecting both a product liability judgement and a workers' compensation payment; a product liability defendant and an employer will pay for an injury to the extent that each bears liability for that injury; if a product liability award is given, an employer or employer's insurer will be entitled to recover workers' compensation payments it has made to the extent that it has paid for more than its share of the liability; and

● before reaching a settlement in a product liability suit involving workers' compensation, an employee will be required to give written notification to his or her employer.

Biomaterials suppliers:

● separate liability limits will be enacted for entities that supply component parts or raw materials for making medical devices, including implants, that are intended to be placed into human bodies.

Precedent:

● any decision of a Federal court of appeals interpreting this bill will control subsequent decisions in State and Federal courts unless it is overturned by the Supreme Court.

Those favoring final passage contended:

After years of debate and countless filibusters the logjam on product liability reform has finally been broken. The Senate, at last, is about to approve a reform bill. More significantly, perhaps, the House has also acted, and if the conference committee returns a product that President Clinton can be persuaded to support, it will become law. Though the journey has been arduous we knew this moment would come, because the tort system has been deteriorating so badly that its costs have become steadily more difficult to deny.

The only beneficiaries of the current system are the lawyers who feed off of it. People who have suffered grievous injuries because of defective products must often wait for 4 or 5 years before their cases are resolved, and when a settlement is reached their attorneys typically take between 1/3 and 1/2 of their compensation. Businesses are ordered to pay damages based not on their degree of guilt, but upon how much money they have. Awards vary wildly for subjective awards (noneconomic losses and punitive damages), as juries act with little or no guidelines. Engaging in interstate commerce has become a crapshoot, in which the civil laws in most of the 50 States can result in fines immensely greater than are allowed in any criminal trial, and those fines are imposed without any of the due process protections that are involved in criminal proceedings. Businesses, to stay in business, raise their prices. Businesses, to stay in business, will not introduce new products, particularly medical products, because of the danger of suits. Businesses, to stay in business, dare not even improve their products for fear of being accused of selling inferior products previously. No one benefits when product liability insurance in America either is unavailable entirely or costs 15 to 20 times more than it does in Europe and Japan. No one benefits when product liability costs add $3,000 to a pacemaker, $170 to the cost of a wheelchair, $100 to the cost of a $200 football helmet, or $20 to the cost of a stepladder, and certainly no one benefits when companies such as DuPont, Dow Chemical, and Dow Corning refuse to supply medical device manufacturers with the raw materials they need because they know that they, as large companies, would be the targets of unjust suits. Each year more than 70,000 product liability lawsuits are filed in the United States. In contrast, around 200 such suits are filed each year in Great Britain. The costs of this litigiousness are enormous. According to the Product Liability Coordinating Committee, the annual cost to America is between $80 billion and $120 billion.

The solutions in this bill are straightforward and modest. First, a limit will be placed on the civil "punishment" that can be placed on small businesses and on individuals of average means. The purpose of "punishment" in civil actions, after all, is to discourage future reprehensible conduct, not to drive businesses and individuals into bankruptcy. Second, the bill will make it harder to impose limitless damage awards in cases affecting larger businesses; juries will lose this right, but judges will retain it. Third, joint liability for noneconomic damages will be eliminated. It will no longer be possible to force a company that bears only 1 percent of the liability for the damage caused by a product to pay 100 percent of the noneconomic losses, which are entirely subjective awards for such losses as pain and suffering. These provisions and the other provisions in this bill are strictly limited to product liability cases.

Two basic arguments have been made against this bill. First, some Senators have denied that any problem exists. They have argued that punitive damage awards are not a problem because relatively few such awards are given. However, we have never contended that there are a lot of awards; instead, we have pointed to the harmful effects of the occasional huge judgments and to their basic unfairness. Senators who deny there is a problem when the risks are so great that in many States punitive damage insurance cannot even be bought are guilty of willful ignorance. Similarly, Senators who have opposed several liability for noneconomic losses have steadfastly refused to admit that those losses are sometimes grossly inflated. Holding a business that is only marginally responsible for an injury 100 percent liable for noneconomic losses is fundamentally unfair, especially when those losses, just like punitive damages, may prove to be enormous. Senators who have argued that the system does not hurt the economy have noted that companies still make products and still develop new products. Of course they do. We have never contended that the product liability tort system has totally destroyed the economy. It has only added to the costs of doing business and of creating new products. Those costs are not borne by companies--they are passed on to consumers, directly in the form of higher prices, and indirectly in the form of fewer products and less innovation in developing new products. Our argument has never been that companies are unable to produce and innovate; it has been that they will be able to produce more and innovate more without the current unfair burdens placed on them by the erratic product liability laws of the 50 States.

The second argument that has been consistently raised by our colleagues is that the Federal Government has no business interfering with State product liability laws. This argument is rather curious, considering that many of the Members who have advanced it are ordinarily happy to usurp States' rights on the most tenuous of excuses. In this case, though, the right to interfere is anything but tenuous. One of the principle reasons for calling the Constitutional Convention was to end the chaos that attended interstate commerce among the 13 States after the Revolutionary War and before the Constitution was adopted. According to Alexander Hamilton, Congress was given plenary power over interstate commerce in the Constitution to prevent commerce from being "fettered, interrupted, and narrowed" by parochial State interests. Unfortunately, interstate commerce has gradually been restricted by the ever worsening product liability laws of some States. Approximately 70 percent of all goods move in interstate commerce. Thus, nearly ever business in every State is threatened by the unpredictable product liability laws of other States. We think Congress clearly has the right, if not the constitutional duty, to bring order to this chaotic situation. Not all the States have out-of-control tort systems; the problem is concentrated in a few States, and in some cases even within a few rural counties of those States. To put it very bluntly, a few rural counties seem to be specializing in enormous damage judgments against out-of-State businesses.

Over the past several Congresses, efforts to pass a product liability bill have been bipartisan. Though Republicans have generally been more supportive, the issue has not clearly divided on party lines. Senators from both parties are found on both sides of the debate. This fact, in our opinion, has led to a more serious examination of the issue than would otherwise have occurred. Though the debate on this bill has been sometimes rancorous, we are very pleased that it in the end it did not become a simple Republican versus Democrat vote.

After this bill passes it will go to conference. The House has already passed its version of product liability reform. Its version includes provisions that will cap punitive damages in all civil cases, eliminate joint liability for noneconomic losses in all civil cases, and reform medical malpractice laws. It is quite similar to the Senate bill as it existed when the Senate first failed to invoke cloture on it. We have no doubt that the House-passed bill is more popular with the American people. In poll after poll, 70 percent to 90 percent of the American people have consistently expressed support for the type of strong provisions which our House colleagues have approved.

However, President Clinton not only opposes the House version of the bill, he has even threatened to veto the Senate bill as it is currently drafted. Many of us consequently hope that the Senate version of this bill will survive the conference intact, because it has the best chance of gaining the President's support and becoming law. Others of us are willing to strengthen this bill and risk a veto. We all, however, are very pleased to have the opportunity now to vote for final passage.

Those opposing final passage contended:

H.R. 956 is unfair to victims of unsafe products, unfair to consumers, unnecessary for the economy, and an extreme infringement on States' rights. All it does is absolve manufacturers of responsibility for the harm their products inflict on Americans.

Passing this bill will hinder average Americans from receiving compensation for injuries they receive from unsafe products. We know of one case, for example, in which eight working-class families successfully sued two of the largest corporations in America

for causing the illness and death of their children by polluting their water supply. The attorney who took that case spent 9 years and $1 million of his own money before the jury reached its verdict. He reports, though, that if the limits on awards that this bill will establish had been in effect when those families came to him, he would have refused to take the case. Those families would have been unable to sue if this bill had been law. Similarly, victims in the famous Ford Pinto suits would likely have never been able to receive fair compensation. In that case, the Ford Motor Company made the decision that it would be cheaper to pay for the deaths and injuries that would result from the gas tanks that it knew were defective in their Pintos than it would be to fix those tanks. We ask our colleagues if it were their spouse who was burned to death because of this "business" decision, do they think that a $250,000 fine would be adequate punishment? Would attorneys take on the difficult, time-consuming task of challenging one of the world's largest organizations when they know that the costs of doing so, even if they win, will likely be greater than the maximum awards allowed?

The answer, in many instances, will obviously be "no." Without the threat of large punitive damage awards, companies like Ford will be able to produce dangerous products with relative impunity. The safety of products in America will decline. Consumer products are already responsible for an estimated 29,000 deaths and 30 million injuries each year. We certainly do not favor increasing these numbers just to protect the callous behavior of companies that willingly hurt their customers to make greater profits.

After listening to our colleagues, one might reasonably conclude that U.S. manufacturers are cowering under a deluge of unjust product liability suits. Happily, though, the dismal world described by our colleagues does not exist. The competitiveness of American companies is not harmed in the slightest by our current product liability system. A quick look at the industry that is perhaps the most affected by suits, the pharmaceutical industry, proves this point. Between 1970 and 1992, close to half of the important new drugs sold in major markets around the world were introduced by U.S. pharmaceutical companies. Further, U.S. pharmaceutical companies will spend nearly $15 billion on drug research and development in 1995.

Further proof that the product liability system is not out of control is provided by examining the number and type of cases that are brought. According to the Rand Corporation, only 10 percent of injury victims use the tort system to seek compensation. In fact, product liability cases comprise only 4 percent of all tort filings, and the number of such filings has been declining since 1991. Punitive judgments are even rarer--one study found that punitive awards had been given only 355 times in product liability cases between 1965 and 1990. Considering that those judgments are out of a universe of hundreds of millions of injuries between 1965 and 1990, we think that juries have been rather circumspect in their awards.

One of the more interesting aspects of this debate is that many of those Senators who are constantly talking about States' rights and the need to limit the size and scope of the Federal Government are also the strongest supporters of this bill. For more than 200 years States have exercised nearly total jurisdiction over product liability laws. Each State has developed its own system in accordance with local needs and desires. As we have already discussed, the overall effect of these 50 separate systems has been beneficial. Our colleagues, though, do not like the decisions that have been made by some States. They think that we here in Washington can make better decisions.

Except for their manufacturing friends, they are alone in this opinion. The testimony we have heard from the States, both from legislators and judges, is that this bill is unwanted, unnecessary, and will cause havoc. Consumer groups and victims organizations have also expressed alarm at the damage this bill will cause.

We are not surprised that every expert opinion we have heard has been that this bill should be defeated. H.R. 956 will be harmful to both consumers and people who have been injured by unsafe products, and it will trammel States' rights. Clearly it should be rejected.